Filed 5/29/19 P. v. Harvey CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALLAN HARVEY, Defendant and Appellant.	C087516 (Super. Ct. No. 15F1228)

Defendant Michael Allan Harvey pleaded no contest to attempted robbery, but with approval of the parties and the trial court, he subsequently withdrew that plea and pleaded no contest to first degree robbery. The trial court suspended imposition of sentence, placed defendant on probation for three years, and ordered defendant to pay various fines, fees and assessments.

Defendant now contends (1) his second plea to robbery was involuntary because the parties induced him to forsake his original plea, and (2) he received ineffective assistance of counsel. We conclude defendant forfeited the claim that his plea was involuntary because he did not move to withdraw the plea, and he has not established ineffective assistance of counsel.

In supplemental briefing, defendant claims that pursuant to the holding in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168, 1172 (*Dueñas*), the portion of the trial court order directing defendant to pay a $300 restitution fine, a $40 court operations assessment, and a $30 criminal conviction assessment should be stayed pending a hearing

on his ability to pay. We will remand the matter to permit a hearing on defendant's ability to pay, and we will otherwise affirm the judgment.

BACKGROUND

In January 2018, defendant pleaded no contest to attempted robbery. During his plea hearing, defendant agreed to serve a six-month sentence consecutive to his sentence in another case. But in May 2018, the parties and the court agreed that defendant could withdraw the plea and enter a new plea because the six-month sentence was unauthorized. Pursuant to the second plea agreement, defendant pleaded no contest to first degree robbery and agreed to serve three years concurrent to his sentence in case No. 14F7709, which was then completed. At the end of the plea hearing, however, the trial court indicated, following an off the record bench conference, that there would be more discussion "to see if we can find a way to enforce the spirit of this agreement."

Following further off the record discussions at the subsequent sentencing hearing, the trial court told defendant that although defendant agreed to a sentence in which he believed custody time would have been completed, there was a credit problem that would have required defendant to complete what was left of the three year sentence. To avoid having defendant serve more time, counsel agreed to give defendant credit for time served but place him on probation.

Defendant asked various questions about this arrangement, noting that he had agreed to a three year concurrent sentence. The trial court advised defendant to spend more time discussing the ramifications of the plea with his counsel, saying "you don't have to accept this." After a recess, defendant's counsel said defendant was prepared to move forward with probation as they had discussed. Defendant confirmed that he understood what they had talked about, and he was satisfied with, and was willing to go forward with, the probationary sentence. The trial court suspended imposition of sentence, placed defendant on probation for three years, and ordered him to pay the following fines, fees and assessments: a $300 restitution fine (Pen. Code, § 1202.4,

subd. (b)),[1] a $300 probation revocation fine (§ 1202.44), and $780 per count (stayed pending probation) consisting of a $200 base fine (§ 672), a $200 state penalty assessment (§ 1464, subd. (a)), a $20 DNA penalty assessment (Gov. Code, § 76104.6), an $80 DNA penalty assessment (Gov. Code, § 76104.7), a $100 state court facilities construction fee (Gov. Code, § 70372, subd. (a)(1)), a $140 county penalty assessment (Gov. Code, § 76000, subd. (a)(1)), and a $40 state criminal fine surcharge (§ 1465.7, subd. (a)). In addition, the trial court ordered defendant to pay a $40 court operations assessment (§ 1465.8, subd. (a)(1)) and a $30 criminal conviction assessment (Gov. Code, § 70373).

DISCUSSION

I

Defendant contends his second plea was involuntary because he was misadvised and induced to accept a plea placing him at risk for serving a prison sentence if he violates the terms of his probation.

Under section 1018, a defendant may move to withdraw a plea "at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended." Further, "[a]lthough section 1018 is limited on its face to the period before judgment, the courts have long permitted defendants to move to set aside the judgment as a means of allowing the defendant to withdraw the guilty plea after judgment." (See *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1617.)

A claim that a plea was entered involuntarily is forfeited on appeal when the defendant fails to move to withdraw the plea in the trial court. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1412-1413.) Because defendant did not object at the sentencing hearing and did not subsequently move in the trial court to withdraw his plea, his contention of involuntariness is forfeited.

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[1] Undesignated statutory references are to the Penal Code.

II

Defendant next asserts he received ineffective assistance of counsel, resulting in his decision to accept the second plea agreement. Specifically, he claims that "despite a conscientious effort by the parties, including defense, to fashion an equitable remedy, [defendant] was improperly advised about the length of the sentence of his first plea and then not, apparently, fully aware that his second plea to a violent felony could result in a five-year sentence."

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692 [80 L.Ed.2d 674, 695-696] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).)

" 'Surmounting *Strickland*'s high bar is never an easy task.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 105 [178 L.Ed.2d 624, 642] (*Richter*), quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 371 [176 L.Ed.2d 284, 297].) The reason *Strickland*'s bar is so high is that "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] . . . It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' " (*Richter,* at p. 105.)

When an ineffective assistance of counsel claim can be resolved on the basis that there is an insufficient showing of prejudice, we need not address whether counsel's performance was deficient. (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) To establish prejudice, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " (*Richter, supra,* 562 U.S. at p. 104.) The defendant must show a reasonable probability that he would have received a more favorable result had

counsel's performance not been deficient. (*Strickland, supra,* 466 U.S. at pp. 693-694; *Ledesma, supra,* 43 Cal.3d at pp. 217-218.) In this context, defendant must establish "a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.)

Here, defendant has failed to demonstrate prejudice. He contends his counsel's acquiescence to the second plea resulted in prejudice that is self-evident from the greatly increased gravity of his second plea in contrast to his first plea. But defendant does not dispute that the sentence under the first plea was unauthorized. He was not entitled to the benefit of the first bargain.

As for the second plea, the trial court expressly advised defendant that he did not have to accept the new plea arrangement. In addition, the trial court told defendant he could receive five years for violating probation and advised defendant to spend more time discussing the ramifications of the plea with his counsel, which defendant did during a recess. Defendant faced a sentence of up to 14 years in prison had he elected to go to trial. He has not shown, or even argued in his briefing, that he would have insisted on proceeding to trial but for counsel's deficient performance. (See *In re Alvernaz, supra,* 2 Cal.4th at p. 934.) Defendant has failed to establish ineffective assistance.

III

In supplemental briefing, defendant cites *People v. Dueñas, supra,* 30 Cal.App.5th 1157, which held that it is improper to impose a restitution fine, a court operations assessment, or a criminal conviction assessment (identified in *Dueñas* as a facilities assessment) without first determining defendant's ability to pay. (*Dueñas,* at pp. 1168, 1172.) Defendant argues the restitution fine, court operations assessment, and criminal conviction assessment should be stayed pending a hearing on his ability to pay. The Attorney General counters that defendant forfeited this appellate contention because he failed to raise it in the trial court. However, as the court explained in *People v.*

Castellano (2019) 33 Cal.App.5th 485, 489 (*Castellano*), the statutes authorizing imposition of the challenged fine and assessments did not reference consideration of ability to pay, and in fact, section 1202.4, subdivision (c) precluded such consideration. (*Id*. at p. 489.) The court explained that when, as here, the defendant's challenge is based on a newly announced constitutional principle, reviewing courts have declined to find forfeiture. (But see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [*Dueñas* claim forfeited where trial court increased restitution fine above the minimum].) We decline to find forfeiture here, where the trial court imposed the minimum restitution fine and *Dueñas* was decided after sentencing in this case.

Because defendant's conviction and sentence are not yet final, a limited remand under *Dueñas, supra,* 30 Cal.App.5th 1157 is appropriate to permit a hearing on defendant's ability to pay. (See *Castellano, supra,* 33 Cal.App.5th at pp. 490-491.)

DISPOSITION

The matter is remanded to permit a hearing on defendant's ability to pay. The judgment is otherwise affirmed.

/S/
MAURO, Acting P. J.

We concur:

/S/
MURRAY, J.

/S/
KRAUSE, J.